**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JACK R. McCHRISTIAN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 193,082 |
| **TOTAL PETROLEUM, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **ITT HARTFORD** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appeals from a decision on an application for review and modification entered by then Assistant Director Brad E. Avery on April 17, 1998. The Appeals Board heard oral argument on December 2, 1998.

### APPEARANCES

Orvel Mason of Arkansas City, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Appeals Board has considered the record.

### ISSUES

On December 17, 1996, the Appeals Board entered an Order granting claimant benefits for an 11 percent disability based on functional impairment. The award was limited to the functional impairment pursuant to K.S.A. 1991 Supp. 44-510e because claimant had returned to work at a comparable wage.

On September 27, 1996, respondent closed some of its facilities and claimant was laid off. On December 23, 1996, claimant filed an application for review, contending he was no longer earning a comparable wage and was therefore entitled to a work disability. The Assistant Director ruled that the job claimant returned to after the injury was an unaccommodated job and claimant, therefore, was not entitled to a work disability. The Assistant Director relied on the decision by the Kansas Court of Appeals in *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997). Claimant appealed and the Appeals Board reversed the Assistant Director. The Board found the job claimant returned to was an accommodated job and claimant was therefore entitled to work disability. The

Board relied on *Lee v. Boeing Co.- Wichita*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). The Board then remanded the case to the ALJ for decision on the nature and extent of the work disability.

On April 17, 1998, the Assistant Director entered the decision which is the subject of the current appeal. The Assistant Director, deciding the remanded issue, found claimant has a 41.5 percent work disability based on a 60 percent loss of ability to earn a wage and a 23 percent labor market loss.[1] On appeal, claimant now challenges the findings relating to the nature and extent of claimant's disability. Claimant contends the Assistant Director erred by attributing a wage to claimant while claimant was enrolled in a retraining program necessary to facilitate his re-entry into the open labor market. Claimant argues the wage factor should be 100 percent. Claimant also disputes the Assistant Director's finding as to the labor market loss. Claimant asserts the Assistant Director erred when he considered the opinion of Ms. Karen C. Terrill because her opinion was premised on the restrictions recommended by Dr. Charles Pence who did not testify in this case. Claimant argues the decision, therefore, violates principles stated in *Roberts v. J.C. Penny Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the argument, the Appeals Board concludes the Award by the Assistant Director should be affirmed.

### Findings of Fact

1. This is a review and modification proceeding for a December 12, 1991, back injury. As above indicated, claimant was originally limited to disability based on functional impairment because he was earning a wage comparable to the wage he was earning at the time of the accident. Because of a layoff which occurred September 27, 1996, claimant filed an application for review and modification. On appeal, the Board determined claimant was entitled to modification of his original award.

The current appeal is from the finding by the Assistant Director, made on remand, that claimant has a 41.5 percent work disability. Most of the evidence was presented as part of the original claim and before the application for review and modification. Evidence presented after the application for review and modification includes the testimony of claimant and testimony of Ms. Karen C. Terrill, a vocational expert.

2. After the layoff, claimant applied at USD #470, General Electric, and at Conoco in Ponca City, Oklahoma, and in Billings, Montana. He did not obtain employment and went to the County Community College Vo-Tech program for machinists. At the time of the January 14, 1997, hearing before the Administrative Law Judge, claimant expected to complete the training program in April 1997. After completing the program he expected to be able to earn $7.50 to $8 per hour.

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[1] The accident occurred before July 1, 1993, and the case is subject to the "old act" standards for work disability based on the claimant's ability rather than the current standards based on loss of ability to perform tasks and actual wage loss.

3. Ms. Karen C. Terrill testified both before and after the application for review and modification. In her first deposition she testified claimant has a labor market loss of 24 percent and if he were no longer working at respondent, he could earn $7 to $8 per hour. At the time of her second deposition, she had information about claimant's training. She testified that with the training claimant should be able to earn $11.03 to $12.69 per hour. She also acknowledged, however, that entry level positions for machinists in the area were likely to pay $7 to $8 per hour. At the time of the second deposition, she concluded claimant had a labor market loss of 23 percent based on the restrictions of Dr. Pence. Based on restrictions of Dr. Ernest R. Schlachter, the labor market loss was, in her opinion, 40 percent. Dr. Schlachter testified, but Dr. Pence did not. Claimant's counsel made no objection in the deposition to the opinion based on Dr. Pence's restrictions. In fact, when respondent's counsel offered Ms. Terrill's report, claimant's counsel stated he had no objections. But, claimant's counsel did object in his submission letter after terminal dates for additional testimony had passed.

4. James T. Molski testified by deposition on September 18, 1995. He concluded claimant would have a 40 to 45 percent loss of access to the labor market based on Dr. Schlachter's restrictions. He concluded claimant could earn between $6 and $7 per hour. This testimony was given before claimant entered the vocational program.

## Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1991 Supp. 44-501(a).

2. The Board concludes, based on Ms. Terrill's testimony, claimant has a 23 percent loss of ability to obtain and retain employment in the open labor market. This opinion is based on the restrictions by Dr. Pence which the Board concludes are the most appropriate. The Board considers them most appropriate because claimant indicated these were the restrictions he followed. Although Dr. Pence did not testify, claimant's counsel did not make a timely objection.[2] The Board concludes a timely objection is required before the opinion would be excluded and an objection made after the deadline for evidence is not timely.[3]

3. The Board concludes claimant has the ability to earn $8 per hour which, compared to the stipulated preinjury wage of $802.77, is a loss of 60 percent. On appeal, neither party disputes this finding except that claimant's application for review asserted that no wage should be imputed during the period of schooling. This position was not argued in the brief. Perhaps claimant was treating this as a "new act" case. Claimant did not seek retraining under the vocational rehabilitation provisions of the Act and, under the "old act" applicable to this

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[2] Claimant's counsel objected to Ms. Terrill's opinions based on Dr. Pence for the original trial. He objected immediately after Ms. Terrill's deposition by letter dated November 3, 1995. But when Ms. Terrill's report was offered in the review and modification proceedings, claimant's counsel stated he had no objections.

[3] The Board notes that it has, in an earlier decision in this case, already concluded the restrictions by Dr. Schlachter were not reasonable. As a consequence, if the restrictions of Dr. Pence, to which claimant's counsel now objects, were not a permissible basis for Ms. Terrill's opinion, there would remain no appropriate work disability evidence on which the Board might rely and the Board would be limited to the functional impairment opinions.

case, the issue is the claimant's ability. Claimant does argue that the wage opinion should not assume claimant would complete the training. The Board considers it reasonable to assume he would complete the training as there is no suggestion in the record of any other probability.

4. The Board concludes claimant has a work disability of 41.5 percent. This conclusion gives equal weight to the loss of ability to earn a wage and the loss of ability to obtain and retain employment as authorized in *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the decision entered by then Assistant Director Brad E. Avery on April 17, 1998, should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Orvel Mason, Arkansas City, KS
Richard J. Liby, Wichita, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director